Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

SILAS MULLINS,

Petitioner,

v.

MANNING COAL CORPORATION; OLD REPUBLIC INSURANCE COMPANY; Commonwealth of Kentucky, Labor Cabinet, Department of Workplace Standards, Division of the Special Fund; Commonwealth of Kentucky, Labor Cabinet Department of Workers' Claims, Workers' Compensation Board and Lloyd R. Edens, Administrative Law Judge of the Kentucky Department of Workers' Claims;

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR WRIT OF CERTIORARI

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THE CONSTITUTIONAL QUESTIONS PRESENTED

1. If a State requires a threshold number of years of hazardous exposure for workers within its borders as a precursor to receiving workers compensation benefits, is such a requirement an improper limitation on the constitutional right to interstate travel?

2. Is a State "duration of exposure" requirement an improper classification that denies equal protection of the laws to a class of workers whose work-related diseases would otherwise be compensable?

3. Does a State "duration of exposure" requirement, which provides no right of suit for persons who do not meet the threshold requirements, deprive a class of workers of the right to due process of law?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Silas Mullins, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Supreme Court on January 30, 1997, which judgment upheld the constitutionality of Kentucky Revised Statutes §342.316(3)(b).

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals was not published, but was incorporated verbatim into the opinion of the Kentucky Supreme Court, which decision is reported as *Mullins v. Manning Coal Corporation, et al.*, 938 S.W.2d 260 (Kentucky 1997).

JURISDICTION OF THIS COURT

This is an appeal from a decision of the Kentucky Supreme Court declaring a statute, restricting workers' compensation on the basis of the amount of hazardous exposure within the Commonwealth of Kentucky, to be constitutional. This statute was challenged by the Petitioner on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of Article IV of the United States Constitution, as well as similar provisions in the Kentucky State Constitution. The challenge was rejected by the Kentucky Supreme Court in a judgment issued on January 30, 1997. Petitioner sought a stay of the State court decision by motion filed pursuant to

Rule 76.44 of the Kentucky Rules of Civil Procedure, which motion was denied by order issued on February 24, 1997. Petitioner now brings this petition for writ of certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States. The Court has jurisdiction under 28 U.S.C. §1257(a) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES

Kentucky Revised Statutes (KRS) §342.316(3)(b), enacted in 1987, provides as follows:

> Income or retraining incentive benefits for the disease of pneumoconiosis resulting from exposure to coal dust or death therefrom shall not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years during the ten (10) years immediately preceding the date of his last exposure to such hazard, or for any five (5) of the fifteen (15) years immediately preceding the date of such last exposure.

The Petitioner contends that the statute is violative of Section I of the Fourteenth Amendment of the United States Constitution, which provides that:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition to violating the federal Due Process Clause, it is argued that the statute violates the Kentucky due process guarantee, contained in §14 of the Kentucky Constitution, which holds that:

> §14 All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

STATEMENT OF THE CASE

Petitioner was a resident of Virginia when he filed a workers' compensation claim for the disease of coal workers' pneumoconiosis on June 3, 1992, against Manning Coal Corporation, the Kentucky company that had last employed him, and against the Kentucky Special Fund. KRS 342.316(3)(b) was raised as a defense, and the employer moved to dismiss the claim on grounds that Petitioner lacked the required number of years of exposure to Kentucky coal dust. Petitioner challenged the law as being unconstitutional. On July 9, 1993, the Administrative Law Judge assigned to the case by the Kentucky Department of Workers' Claims found that Petitioner did have pneumoconiosis and that he would be entitled to an award of benefits, but that he was barred from receiving the award by operation of KRS 342.316(3)(b) because he did not have "the requisite continuous exposure in the Commonwealth of Kentucky". Petitioner appealed to the Kentucky Workers' Compensation Board, which affirmed

the decision, and then to the Kentucky Court of Appeals, which declared on April 26, 1996, that the law was not unconstitutional. The Kentucky Supreme Court affirmed the appellate decision on January 30, 1997.

REASONS FOR GRANTING THE WRIT

I. The Kentucky law requiring applicants for workers' compensation to have had a threshold number of years of exposure to Kentucky coal dust improperly infringes on the constitutional right to interstate travel.

The right of interstate travel has long been recognized as "a basic constitutional freedom", *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). The right has been ascribed to the privileges and immunities clause of the Fourteenth Amendment, as well as other sources, *Edwards v. California*, 314 U.S. 60 (1941). A state law can infringe upon the right of interstate travel even when it is an indirect deterrent, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986).

Petitioner was an underground coal miner who had mined in Virginia before his last job in Kentucky. All of his work was performed in the Appalachian coalfields, an area which extends from Pennsylvania and Ohio to West Virginia, Virginia, Kentucky and Tennessee. His last work was in Letcher County, Kentucky, which shares a border with Wise County, Virginia, the primary site of his previous mining. Because coal is a natural resource that was in place before state boundaries were negotiated, and because the skills required in underground coal mining

are the same from one state to the next, coal mining is an occupation that lends itself to interstate travel, whether the travel is relocation of residence or commuting across state borders.

The law requiring a threshold amount of Kentucky exposure is a deterrent for a miner crossing state lines to work, because it prohibits the miner from being eligible to apply for compensation for an occupational disease until he has accumulated five years of exposure in Kentucky, or has an uninterrupted two year period of dust exposure. Thus, a person who develops "black lung" while working in Kentucky would receive neither treatment for the illness, nor recompense, unless he continued to be exposed to the hazards of the disease for a sufficient period of years. We would point out that such discrimination not only deters miners from entering Kentucky to work, it also penalizes Kentucky residents from spending part of their mining career out of state. Thus, while the Kentucky law does not directly prohibit interstate travel directly, it creates an economic sanction tied to the amount of service within the borders of the state, and as such, deters travel. As such, it is ripe for review by this Court upon certiorari.

II. The Kentucky exposure requirement denies, without rationally serving a legitimate state purpose, equal protection of the laws to a class of workers whose work-related diseases would otherwise be compensable.

In this case, the Petitioner was found to have an occupational disease and he would have been compensated for the disease, but for not having enough time in Kentucky mining. Because of his classification of insufficient years, he was denied the protection that is afforded persons who have "enough" years in the mines. A statute that distributes benefits unequally is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment, *Zobel v. Williams*, 457 U.S. 55, 59-60 (1982). However, the statute can pass such scrutiny if it rationally furthers a legitimate state purpose, Id. at 60.

The Kentucky courts held that the Commonwealth of Kentucky has "a legitimate interest in providing a workers' compensation system that will sustain itself and continue to operate to compensate disabled workers" and that "In furtherance of that interest, it reasonably can act to prevent forum shopping by workers from other states already infected with the disease of pneumoconiosis," *Mullins, supra*, 938 S.W.2d at 263. Accepting that as the reasoning of the State, however, the statute *as written* goes beyond the legitimate interest defined by the State courts. There was no evidence that the Petitioner was "already infected" with a lung disease. The statute discriminates against all persons lacking sufficient time in the mines, regardless of whether they are "already infected" or not. Thus, the statute does not *rationally* advance the stated "legitimate purpose", which ostensibly is to

stop persons who have been diagnosed with a lung disease from filing claims. To the extent that the statute bars persons who are not "already infected" on grounds of their classification, it denies equal protection without rationally serving its stated purpose. Hence, the statute should be reviewed on certiorari.

III. The Kentucky exposure requirement, combined with the denial of an alternative remedy, denies due process to a class of workers who fall outside the requirement.

Petitioner challenged the statute on grounds that it violated the Fourteenth Amendment to the United States Constitution and similar grounds in the Kentucky Constitution. Petitioner also raised a challenge that the statute, by providing no remedy for his occupational disease, violated Section 14 of the Kentucky Constitution and deprived him of due process of the laws. The State constitutional section is a variation on the Federal due process clause. The Federal guarantee might well be described as a right to defend (one may not have their rights deprived without a fair proceeding) while the Kentucky provision guarantees a right to prosecute (that all courts shall be open for all persons for an injury to the person). The procedural rub in this instance is that Kentucky law prohibits Petitioner from going outside of the State Workers' Compensation Act (KRS 342.690), yet bars him from pursuing an action within the Act either (KRS 342.316(3)(b)). To that extent, the Petitioner is being deprived of due process of the law, as defined by the Federal Constitution or the broader State clause. Certiorari is appropriate for reviewing the conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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RENDERED: JANUARY 30, 1997
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

96-SC-433-WC

SILAS MULLINS — APPELLANT

V. APPEAL FROM COURT OF APPEALS
NO. 95-CA-524-WC
(Workers' Compensation Board No. 92-21726)

MANNING COAL CORPORATION;
OLD REPUBLIC INSURANCE COMPANY;
VICKI NEWBERG, Acting Director
of SPECIAL FUND; LLOYD R. EDENS,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION OF THE COURT

AFFIRMING

Having considered the arguments of the parties and the opinion of the Court of Appeals in the above-styled matter, we are not persuaded that the decision was in error. Accordingly, we adopt the well-reasoned opinion of the Court of Appeals and set it forth as follows:

"BEFORE: KNOPF, SCHRODER, and WILHOIT, Judges.

"WILHOIT, JUDGE. This is a petition for review of the decision of the Workers' Compensation Board rendered on January 27, 1995, affirming the opinion and order of the administrative law judge denying the appellant retraining incentive benefits under the jurisdictional provision of KRS 342.316(3) (b).

"The appellant was a heavy equipment operator in and around Virginia coal mines from 1977 to 1990. In

March 1990 he took a position with the appellee, Manning Coal Corporation, in Kentucky where he continued to work until March 1, 1991. On June 3, 1992, the appellant filed a workers' compensation claim, seeking income or retraining incentive benefits.

"Though the ALJ found the appellant suffered from the disease of coal workers' pneumoconiosis, he also found that the appellant had not met the jurisdictional requirements of KRS 342.316(3) (b). The appellant was, therefore, precluded from recovering retraining incentive benefits. It is undisputed that the appellant was exposed to the hazards of coal workers' pneumoconiosis for only one year in Kentucky.

"An appeal to the Workers' Compensation Board followed, in which the appellant attacked the constitutionality of KRS 342.316 (3) (b) under both the Kentucky and United States Constitutions. He also argued that the statute conflicted with other portions of the Workers' Compensation Act. The Board acknowledged that it lacked authority to address the alleged constitutional violations, citing *Blue Diamond Coal Co. v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945); and *Kenton & Campbell Benev. Burial Ass'n v. Goodpaster*, 304 Ky. 233, 200 S.W.2d 120 (1946). The Board also rejected the appellant's argument that KRS 342.316(3) (b) is in conflict with KRS 342.610(1), 342.640(1), and 342.690(1).

"KRS 342.610(1) states:

> Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault

as a cause of the injury, occupational disease, or death.

"KRS 342.640(1) states:

> The following shall constitute employees subject to the provision of this chapter, except as exempted under KRS 342.650:
>
> (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge, actual or constructive, of the employer;

"KRS 342.690(1) states in part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

"In refusing to accept the appellant's argument, the Board held as follows:

> Statutory construction mandates that wherever possible statutes that appear contradictory on their face be read together to achieve an appropriate result. A further maxim of statutory construction is that a portion of the statute addressing a specific question is to be given precedence over a general statutory provision.

> In light of previous court determinations relating to the exposure requirements in occupational disease claims and recognizing that KRS 342.316 specifically addresses that which is necessary to establish a compensable occupational disease claim in Kentucky it is controlling over any perceived general statutes which are outlined above.
>
> KRS 342.610 clearly defines Manning as an employer who is subject to Chapter 342. This section goes on to say the employer will be liable for occupational disease. KRS 342.316 (3) (b) merely defines under what conditions an employer will not be held liable for an occupational disease. KRS 342.316(3) (b) requires a minimum requirement that Mullins be exposed to the hazards of pneumoconiosis in Kentucky for at least two (2) years to establish he contracted at least part of the disease in the Commonwealth of Kentucky. Mullins is an employee under the Act as defined by KRS 342.640 and he is covered by the Workers' Compensation Act. He has had an opportunity at his remedy in Kentucky.

This appeal followed with the appellant reiterating the arguments previously advocated.

"The appellant submits that KRS 342.316(3) (b) is invalid as violative of the equal protection principles set forth in both the Kentucky and United States Constitutions. He further argues that the statute violates § 14 of the Kentucky Constitution by denying him a "remedy" for his injury. The appellant also asserts that the statute is in conflict with other provisions of the Act.

"KRS 342.316(3) (b) provides as follows:

> Income or retraining incentive benefits for the disease of pneumoconiosis resulting from exposure to coal dust or death therefrom shall not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years during the ten (10) years immediately preceding the date of his last exposure to such hazard, or for any five (5) of the fifteen (15) years immediately preceding the date of such last exposure.

Initially, we will note that we agree with the Board's conclusion that this statute is not in conflict with those provisions of Chapter 342 cited by the appellant. KRS 342.316(3) (b) delineates a threshold requirement for the claimant to recover workers' compensation benefits which is wholly unrelated to the provisions relied upon by the appellant.

"With regard to the appellant's argument concerning § 14 of the Kentucky Constitution, we are unpersuaded. The appellant attempts to analogize this situation with that presented in *Ludwig v. Johnson*, 243 Ky. 534, 49 S.W.2d 349 (1932). In *Ludwig*, our highest court struck down as unconstitutional Kentucky's "guest statute" enacted in 1930. The Court held that § 14 of the Kentucky Constitution guaranteed an injured party's right to attempt to recover compensation from the wrongdoer who allegedly perpetrated the harm. *Id.* The Workers' Compensation Act, however, is not predicated upon redressing a wrong which has caused an injury. In fact, liability under the compensation act is not in any way dependent on negligence, tortious conduct, or comparative negligence. *See*

generally Tyler-Couch Const. Co. v. Elmore, Ky., 264 S.W.2d 56 (1954). An employee's right to occupational disease benefits is purely statutory in nature and does not fall under the ambit of § 14 of the Kentucky Constitution. The General Assembly clearly is free to limit application of workers' compensation benefits as it has with KRS 342.316(3) (b). The appellant's theory of the Case would lead to the absurd result that the General Assembly may not limit applicability of the Act in any way.

"We, likewise, find the appellant's argument attacking the constitutionality of KRS 342.316(3) (b) on equal protection grounds to be meritless. Undoubtedly, in the workers' compensation context, the General Assembly may properly classify in its legislation provided the "objective is legitimate and the classification is rationally related to that objective." *Chapman v. Eastern Coal Corp.,* Ky., 519 S.W.2d 390, 393 (1975); *see also Kentucky Harlan Coal Co. v. Holmes,* Ky., 872 S.W.2d 446 (1994). The appellant concedes that, as KRS 342.316(3) (b) relates to insulating the Special Fund from certain liability, the General Assembly has a legitimate interest in limiting claims. He submits, however, that no legitimate state interest exists in placing the same limitations on retraining incentive benefit claims, in which the Special Fund is not a party.

"The General Assembly has a legitimate interest in providing a workers' compensation system that will sustain itself and continue to operate to compensate disabled workers. In furtherance of that interest, it reasonably can act to prevent forum shopping by workers from other states already infected with the disease of pneumoconiosis. It is Kentucky's employers who are ultimately responsible for the payment of workers'

compensation benefits, and ultimately, the frequency and severity of those benefits are reflected in the insurance premiums Kentucky employers pay to their carriers. Consequently, it is this court's conclusion that KRS 342.316(3)(b) is rationally related to a legitimate state interest.

"The opinion of the Workers' Compensation Board is affirmed.

"ALL CONCUR."

The decision of the Court of Appeals is hereby affirmed.

Stephens, C.J., and Cooper, Graves, Johnstone, Lambert, Stumbo, and Wintersheimer, JJ., concur.

ATTORNEY FOR APPELLANT:

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RENDERED: April 26, 1996; 2:00 p.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

95-CA-0524-WC

SILAS MULLINS — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. 92-21726

MANNING COAL CORPORATION;
OLD REPUBLIC INSURANCE COMPANY;
VICKI NEWBERG, Acting Director of the Special Fund; HON. LLOYD R. EDENS, Administrative Law Judge;
and the WORKERS' COMPENSATION BOARD APPELLEES

OPINION AFFIRMING

BEFORE: KNOPF, SCHRODER, and WILHOIT, Judges.

WILHOIT, JUDGE. This is a petition for review of the decision of the Workers' Compensation Board rendered on January 27, 1995, affirming the opinion and order of the administrative law judge denying the appellant retraining incentive benefits under the jurisdictional provision of KRS 342.316(3) (b).

The appellant was a heavy equipment operator in and around Virginia coal mines from 1977 to 1990. In March 1990 he took a position with the appellee, Manning Coal Corporation, in Kentucky where he continued

to work until March 1, 1991. On June 3, 1992, the appellant filed a workers' compensation claim, seeking income or retraining incentive benefits.

Though the ALJ found the appellant suffered from the disease of coal workers' pneumoconiosis, he also found that the appellant had not met the jurisdictional requirements of KRS 342.316(3) (b). The appellant was, therefore, precluded from recovering retraining incentive benefits. It is undisputed that the appellant was exposed to the hazards of coal workers' pneumoconiosis for only one year in Kentucky.

An appeal to the Workers' Compensation Board followed, in which the appellant attacked the constitutionality of KRS 342.316(3) (b) under both the Kentucky and United States Constitutions. He also argued that the statute conflicted with other portions of the Workers' Compensation Act. The Board acknowledged that it lacked authority to address the alleged constitutional violations, citing *Blue Diamond Coal Co. v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945); and *Kenton & Campbell Benev. Burial Ass'n v. Goodpaster*, 304 Ky. 233, 200 S.W.2d 120 (1946). The Board also rejected the appellant's argument that KRS 342.316(3) (b) is in conflict with KRS 342.610(1), 342.640(1), and 342.690(1).

KRS 342.610(1) states:

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KRS 342.640(1) states:

> The following shall constitute employees subject to the provision of this chapter, except as exempted under KRS 342.650:
>
> (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge, actual or constructive, of the employer;

KRS 342.690(1) states in part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

In refusing to accept the appellant's argument, the Board held as follows:

> Statutory construction mandates that wherever possible statutes that appear contradictory on their face be read together to achieve an appropriate result. A further maxim of statutory construction is that a portion of the statute addressing a specific question is to be given precedence over a general statutory provision. In light of previous court determinations relating to the exposure requirements in occupational disease claims and recognizing that KRS

> 342.316 specifically addresses that which is necessary to establish a compensable occupational disease claim in Kentucky it is controlling over any perceived general statutes which are outlined above.
>
> KRS 342.610 clearly defines Manning as an employer who is subject to Chapter 342. This section goes on to say the employer will be liable for occupational disease. KRS 342.316(3) (b) merely defines under what conditions an employer will not be held liable for an occupational disease. KRS 342.316(3) (b) requires a minimum requirement that Mullins be exposed to the hazards of pneumoconiosis in Kentucky for at least two (2) years to establish he contracted at least part of the disease in the Commonwealth of Kentucky. Mullins is an employee under the Act as defined by KRS 342.640 and he is covered by the Workers' Compensation Act. He has had an opportunity at his remedy in Kentucky.

This appeal followed with the appellant reiterating the arguments previously advocated.

The appellant submits that KRS 342.316(3) (b) is invalid as violative of the equal protection principles set forth in both the Kentucky and United States Constitutions. He further argues that the statute violates § 14 of the Kentucky Constitution by denying him a "remedy" for his injury. The appellant also asserts that the statute is in conflict with other provisions of the Act.

KRS 342.316(3) (b) provides as follows:

> Income or retraining incentive benefits for the disease of pneumoconiosis resulting from exposure to coal dust or death therefrom shall

> not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years during the ten (10) years immediately preceding the date of his last exposure to such hazard, or for any five (5) of the fifteen (15) years immediately preceding the date of such last exposure.

Initially, we will note that we agree with the Board's conclusion that this statute is not in conflict with those provisions of Chapter 342 cited by the appellant. KRS 342.316(3) (b) delineates a threshold requirement for the claimant to recover workers' compensation benefits which is wholly unrelated to the provisions relied upon by the appellant.

With regard to the appellant's argument concerning § 14 of the Kentucky Constitution, we are unpersuaded. The appellant attempts to analogize this situation with that presented in *Ludwig v. Johnson*, 243 Ky. 534, 49 S.W.2d 349 (1932). In *Ludwig*, our highest court struck down as unconstitutional Kentucky's "guest statute" enacted in 1930. The Court held that § 14 of the Kentucky Constitution guaranteed an injured party's right to attempt to recover compensation from the wrongdoer who allegedly perpetrated the harm. *Id.* The Workers' Compensation Act, however, is not predicated upon redressing a wrong which has caused an injury. In fact, liability under the compensation act is not in any way dependent on negligence, tortious conduct, or comparative negligence. *See generally Tyler-Couch Const. Co. v. Elmore*, Ky., 264 S.W.2d 56 (1954). An employee's right to occupational disease benefits is purely statutory in nature and does not fall under the ambit of § 14 of the Kentucky Constitution. The

General Assembly clearly is free to limit application of workers' compensation benefits as it has with KRS 342.316(3) (b). The appellant's theory of the case would lead to the absurd result that the General Assembly may not limit applicability of the Act in any way.

We, likewise, find the appellant's argument attacking the constitutionality of KRS 342.316(3) (b) on equal protection grounds to be meritless. Undoubtedly, in the workers' compensation context, the General Assembly may properly classify in its legislation provided the "objective is legitimate and the classification is rationally related to that objective." *Chapman v. Eastern Coal Corp.*, Ky., 519 S.W.2d 390, 393 (1975); *see also Kentucky Harlan Coal Co. v. Holmes*, Ky., 872 S.W.2d 446 (1994). The appellant concedes that, as KRS 342.316(3) (b) relates to insulating the Special Fund from certain liability, the General Assembly has a legitimate interest in limiting claims. He submits, however, that no legitimate state interest exists in placing the same limitations on retraining incentive benefit claims, in which the Special Fund is not a party.

The General Assembly has a legitimate interest in providing a workers' compensation system that will sustain itself and continue to operate to compensate disabled workers. In furtherance of that interest, it reasonably can act to prevent forum shopping by workers from other states already infected with the disease of pneumoconiosis. It is Kentucky's employers who are ultimately responsible for the payment of workers' compensation benefits, and ultimately, the frequency and severity of those benefits are reflected in the insurance

premiums Kentucky employers pay to their carriers. Consequently, it is this court's conclusion that KRS 342.316(3)(b) is rationally related to a legitimate state interest.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY

WORKERS' COMPENSATION BOARD

OPINION RENDERED: January 27, 1995

CLAIM NO. 92-21726

SILAS MULLINS — PETITIONER

vs. **APPEAL FROM HON. LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE**

MANNING COAL CORPORATION, SPECIAL FUND, and HON. LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE — RESPONDENT

AFFIRMING

BEFORE: ANGELUCCI, Chairman, GREATHOUSE and LOVAN, Board Members.

LOVAN, MEMBER. Silas Mullins ("Mullins") appeals from an Opinion and order issued by Hon. Lloyd R. Edens, Administrative Law Judge ("ALJ"), denying Mullins income and retraining incentive benefits pursuant to KRS 342.316(3)(b) on July 9, 1993. Mullins is 40 years old. He is a coal worker who primarily operates heavy equipment. Mullins worked in Virginia from 1977 until 1990. He started working in Kentucky for Manning Coal Corporation ("Manning") in March of 1990 and continued employment until March 1, 1991. On June 3, 1992, Mullins filed a claim for income and retraining benefits against Manning.

After a review of all of the evidence, the ALJ found that Mullins had Category 1 coal workers' pneumoconiosis and was only entitled to retraining incentive benefits and not income benefits. However, the ALJ found that Mullins was precluded from receiving RIB benefits because he had not been exposed to the hazards of pneumoconiosis for a continuous period of not less than two years in Kentucky as required by KRS 342.316(3)(b).

KRS 342.316(3)(b) states as follows:

> Income or retraining incentive benefits for the disease of pneumoconiosis resulting from exposure to coal dust or death therefrom shall not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years immediately preceding the date of his last exposure to such hazard, or for any five (5) of the fifteen (15) years immediately preceding the date of such last exposure.

The fact that Mullins has only been exposed to the hazards of pneumoconiosis in Kentucky for one year is undisputed by all parties. In addition, the ALJ's applicability of KRS 342.316(3)(b) to Mullins' claim is undisputed.

Mullins argues first that KRS 342.316(3)(b) is in conflict with other parts of Chapter 342 of the Kentucky Revised Statutes, specifically KRS 342.690, KRS 342.640 and KRS 342.610. Secondly, Mullins argues that KRS 342.316(3)(b) violates the Kentucky and United States Constitutions by discriminating against individuals who

have not worked at least two years in Kentucky. Thirdly, Mullins argues that KRS 342.316(3)(b) violates the Kentucky constitutional guarantee to a remedy for injury.

KRS 342.316(3)(b) is not conflict with other provisions of Chapter 342 which Mullins cites.

The pertinent portions of the allegedly conflicting statutes are:

KRS 342.610 states:

> Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.

KRS 342.640(1) states:

> The following shall constitute employees subject to the provision of this chapter, except as exempted under KRS 342.650:
>
> (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;

KRS 342.690(1) states in part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next

> of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

Statutory construction mandates that wherever possible statutes that appear contradictory on their face be read together to achieve an appropriate result. A further maxim of statutory construction is that a portion of the statute addressing a specific question is to be given precedence over a general statutory provision. In light of previous court determinations relating to the exposure requirements in occupational disease claims and recognizing that KRS 342.316 specifically addresses that which is necessary to estaish a compensable occupational disease claim in Kentucky it is controlling over any perceived general statutes which are outlined above.

KRS 342.610 clearly defines Manning as an employer who is subject to Chapter 342. This section goes on to say the employer will be liable for occupational disease. KRS 342.316(3)(b) merely defines under what conditions an employer will not be held liable for an occupational disease. KRS 342.316(3)(b) requires a minimum requirement that Mullins be exposed to the hazards of pneumoconiosis in Kentucky for at least two (2) years to establish he contracted at least part of the disease in the Commonwealth of Kentucky. Mullins is an employee under the Act as defined by KRS 342.640 and he is covered by the Workers' Compensation Act. He has had an opportunity at his remedy in Kentucky.

The Kentucky Court of Appeals, now Supreme Court, in *Inland Steel vs. Terry,* Ky., 464 SW2d 284 (1971) in interpreting the predecessor to KRS 342.316(3)(b) acknowledged that the requirements of at least two years

exposure preceding the onset of disability was merely another element in the burden of proof placed upon an employee. When an employee failed to satisfy that burden of proof, then he would be unsuccessful in recovering for occupational disease benefits. The courts in a number of cases addressing then KRS 342.316(4) acknowledged its harsh result. Presumably, the legislature addressed that harsh result in part by modifying the exposure requirements necessary to secure benefits under the Kentucky Workers' Compensation Act for coal workers' pneumoconiosis. This provision, however, continues to recognize that there is a public policy "to protect Kentucky employers from liability to migrant workers coming into this Commonwealth already ravaged by the occupational disease." *Lovell vs. Osborne Mining Corporation*, Ky., 395 SW2d 596, 598 (1965). However, Mullins has failed to meet his burden of proof.

Mullins has asked the Board to declare KRS 342.316(3)(b) invalid because it is unconstitutional. Even if it were, this Board would be without authority to invalidate the statute under *State Board of Elections Com'rs vs. Coleman*, Ky., 29 SW2d 619 (1930). In that case, the court states:

> It is only when their provisions necessarily and openly transgress constitutional limitations, or inevitably lead to such transgressions . . . that statute may be declared invalid. *Id.* at 624.

Further, the Board has no authority to decide if a statute is constitutional or not. *Blue Diamond Coal Company vs. Cornett*, Ky., 189 SW2d 963 (1945); *Kenton & Campbell Benev. Burial Ass'n vs. Goodpaster*, Ky., 200 SW2d 120 (1946). The ALJ did not err in applying the law to the

facts in this case. Therefore, we are unable to address Mullins' constitutional objections.

Accordingly, the decision of Hon. Lloyd R. Edens, Administrative Law Judge, is hereby **AFFIRMED** and this appeal is **DISMISSED.**

ANGELUCCI, Chairman, NOT SITTING.

GREATHOUSE, Member, CONCURRING.

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ADMINISTRATIVE LAW JUDGE:

Hon. Lloyd R. Edens
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COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
CLAIM NO. 92-21726

SILAS MULLINS, PLAINTIFF,

vs. **OPINION AND ORDER**

MANNING COAL CORP. and
SPECIAL FUND, DEFENDANTS.

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* * *

FINDINGS OF FACT

1. The plaintiff seeks benefits for an alleged occupational disease. At the pre-hearing conference held on December 8, 1992, the parties stipulated the following matters: coverage under the Act; employment relationship between the plaintiff and the defendant-employer at all relevant times; the defendant-employer had due and timely notice of the plaintiff's claim; the plaintiff's average weekly wage was $400.00; the plaintiff's last date of exposure was March 1, 1991; the plaintiff was last exposed while in the employment of the defendant-

employer; the plaintiff's date of birth was December 1, 1952; the plaintiff has a ninth grade education with no vocational or specialized training; any award of benefits for permanent disability should be apportioned 25% to the defendant-employer and 75% to the Special Fund; and, the plaintiff has filed a claim for Federal Black Lung Benefits. Additionally, the parties stipulated the following issues: (i) applicability of KRS 342.316(3)(b); (ii) existence of the disease; (iii) benefit tier; (iv) causation; (v) length of exposure. A hearing was held on January 28, 1993, in Hazard, Kentucky.

2. The plaintiff, Silas Mullins, testified at the hearing. Mr. Mullins stated that he had been a resident of the State of Virginia for his entire life except for approximately six months when he lived in the State of Kentucky. He further testified that he had worked approximately 19 years in the coal industry, twelve to thirteen of which were spent operating a rotary drill, and the remainder primarily operating a bulldozer, haul-back truck, and end-loader. Mr. Mullins testified that he worked for the defendant-employer until his layoff. He further testified that he was exposed to dust in all of his various jobs in the coal industry. Mr. Mullins explained that he moved to Kentucky for a better job and had no intentions of filing a workers' compensation case before his move. He further testified that he suffers from lupus and phlebitis.

3. Mrs. Tamaria Mullins testified at the hearing that she and Mr. Mullins had been married for approximately eight years and that he had developed breathing problems while working for the defendant-employer. Additionally, she stated that her husband was a regular

worker, that he did not have many absences prior to working for the defendant-employer.

4. The medical testimony in the case is summarized as follows:

(a) Dr. Glen Baker, a pulmonary specialist, testified by Form 108 that he examined the plaintiff on December 11, 1991. Dr. Baker interpreted a chest x-ray taken as a part of the examination as evidencing Category 1/2 pneumoconiosis and pulmonary function studies conducted as a part of the examination yielded FVC of 60% and FEV1 of 51% of predicted normal. It was Dr. Baker's opinion that the etiology of Mr. Mullins' impairment was his combined smoking history and dust exposure.

(b) Dr. William H. Anderson, a pulmonary specialist, testified by Form 108 that he examined the plaintiff on March 30, 1992. A chest x-ray taken as a part of the examination was interpreted as evidencing Category 1/1 pneumoconiosis and pulmonary function studies yielded FVC of 55% and FEV1 of 40% of predicted normal. It was Dr. Anderson's opinion that Mr. Mullins had an occupational lung disease caused by his coal miner employment based upon the x-ray, but that his pulmonary impairment was the result of arteriorsclerotic heart disease and possible lupus.

(c) Dr. Emery Lane testified by report and by deposition that he examined the plaintiff on October 9, 1992. A chest x-ray taken as a part of that examination was interpreted as being compatible with coal workers' pneumoconiosis Category 1/0, and pulmonary function

studies yielded FVC of 58% and FEV1 of 44.3% of predicted normal. Additionally, Dr. Lane reviewed an additional chest x-ray of the plaintiff taken on February 2, 1990, which he interpreted as being compatible with Category 1/1 coal workers' pneumoconiosis. Dr. Lane testified that he had reviewed biopsy slides of the plaintiff's mid-lung zone, which did not show evidence of anything specific to coal workers' pneumoconiosis. Based upon the biopsy, it was Dr. Lane's conclusion that it was most likely that the changes noted in the x-ray were the result of lupus, which was not related to the inhalation of coal dust. Dr. Lane, however, testified on cross-examination that Mr. Mullins had a significant enough exposure history to be consistent with the development of coal workers' pneumoconiosis and that the x-ray densities were consistent with the disease. He further testified that the biopsy size was approximately from 2 to 4 millimeters in diameter and that it did not indicate the condition of the remainder of Mr. Mullins' lungs.

(d) Dr. A. Dahhan, a pulmonary specialist, testified by Form 108 that he examined the plaintiff on October 10, 1992. A chest x-ray conducted as a part of that examination was interpreted as showing no evidence of coal workers' pneumoconiosis and pulmonary function studies yielded FVC of 49% and FEV1 of 42% of predicted normal.

(e) Dr. Bruce Broudy, a pulmonary specialist, testified by report that he examined the plaintiff on October 6, 1992. A chest x-ray conducted as a part of that examination yielded Category 0/1 coal workers' pneumoconiosis and pulmonary function studies taken as a part of the examination were invalid.

(f) Dr. Matt Vuskovich testified by Form 108 that he examined the plaintiff on August 11, 1992. A chest x-ray taken as a part of the examination did not show evidence of coal workers' pneumoconiosis but pulmonary function studies yielded FVC of 50% and FEV1 of 39% of predicted normal.

5. The first issues which I will address are existence of the disease, benefit tier, and causation. The plaintiff has a 19-year history of employment in the coal mining industry. Twelve or thirteen of these years were spent as the operator of a drill. Considering his work history and relying to a great extent upon the findings by Dr. William H. Anderson, a noted pulmonary authority, it is my opinion and I do so find that the plaintiff, Silas Mullins, has Category 1 coal workers' pneumoconiosis. Dr. Anderson's finding is supported to some extent by the similar findings of x-ray interpretations compatible with coal workers' pneumoconiosis made by Drs. Lane and Baker. While Dr. Lane testified that based upon a very small biopsy, the findings on the plaintiff's x-ray were the result of lupus, I am to a great extent persuaded the plaintiff's history of coal mining experience and exposure, as well as the reports filed by Drs. Anderson and Baker. Accordingly, it is my finding that the plaintiff, Silas Mullins, has Category 1 coal workers' pneumoconiosis.

6. The next matter for determination is the correct benefit tier for Mr. Mullins. The pulmonary function studies conducted by Dr. Baker yielded the highest results, with FVC of 60% and FEV1 of 51% of predicted normal. Dr. Baker attributed the pulmonary impairment

to Mr. Mullins' combined smoking history and dust exposure. Dr. Anderson, however, was of the opinion that pulmonary impairment was the result of arteriorsclerotic heart disease and possible lupus. Dr. Lane, likewise, attributed it to the plaintiff's lupus and smoking history. Again, viewing the evidence as a whole in this claim, I am most persuaded by the findings of Dr. Anderson, who relates the plaintiff's decrease in pulmonary capacity to his possible lupus and his arteriorsclerotic heart disease. Accordingly, I am not convinced by the evidence that there is a causative link between the plaintiff's exposure to coal dust and his current pulmonary impairment. Therefore, it is my opinion and I do so find that the plaintiff, Silas Mullins, is solely entitled to the Retraining Incentive Benefit pursuant to KRS 342.732(1)(a).

7. The final issues for determination are the length of exposure and the applicability of KRS 342.316(3)(b). The aforementioned statute provides in part that " . . . (i)ncome or retraining incentive benefits for the disease of pneumoconiosis resulting from exposure to coal dust . . . shall not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years during the last ten (10) years immediately preceding the date of his last exposure to such hazards . . . "

In this instance, the plaintiff worked approximately one year in the Commonwealth of Kentucky and pursuant to the aforementioned statute is barred from receiving either income or retraining incentive benefits by not

meeting the two continuous years of exposure requirement. While the plaintiff argues that the statute is unconstitutional, that is not a matter which can be considered by me in this proceeding. *Blue Diamond Coal Company v. Cornett*, Ky., 189 S.W. 2d 963 (1945). Accordingly, under the dictates of the aforementioned statute, the plaintiff does not have the requisite continuous exposure in the Commonwealth of Kentucky, and his claim must be DISMISSED.

RULINGS OF LAW

Newberg v. Reynolds, Ky., 831 S.W 2d 178 (1992)
KRS 342.316
KRS 342.732

ORDER AND AWARD

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The claim of the plaintiff, Silas Mullins, against the defendant, Special Fund, be and is hereby **DISMISSED**, in that his entitlement to benefits in the aforementioned award is limited solely to the Retraining Incentive Benefit.

2. The claim of the plaintiff, Silas Mullins, against the defendant, Manning Coal Corp., be and is hereby **DISMISSED** pursuant to KRS 342.316(3)(b).

SO ORDERED, this 9 day of July, 1993.

/s/ Lloyd R. Edens
Lloyd R. Edens
Administrative Law Judge